229572

MORRISON | FOERSTER

2000 PENNSYLVANIA AVE., NW
WASHINGTON, D.C.
20006-1888

TELEPHONE: 202.887.1500
FACSIMILE: 202.887.0763

WWW.MOFO.COM

MORRISON & FOERSTER LLP
NEW YORK, SAN FRANCISCO,
LOS ANGELES, PALO ALTO,
SAN DIEGO, WASHINGTON, D.C.
NORTHERN VIRGINIA, DENVER,
SACRAMENTO, WALNUT CREEK
TOKYO, LONDON, BRUSSELS,
BEIJING, SHANGHAI, HONG KONG

May 20, 2011

Writer's Direct Contact
(202) 887-1519
DMeyer@mofo.com

VIA ELECTRONIC FILING

Cynthia T. Brown
Chief, Section of Administration
Office of Procedures
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
MAY 20 2011
Part of
Public Record

Re: ***STB Ex Parte No. 707***

Dear Ms. Brown:

Attached for electronic filing in the above-referenced docket are the Reply Comments of Norfolk Southern Railway Company.

Thank you for your assistance.

Sincerely,

David L. Meyer

Attachment

cc (with attachment): John M. Scheib, Esq.
Greg E. Summy, Esq.

dc-640755

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 707

DEMURRAGE LIABILITY

REPLY COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY

James A. Hixon
John M. Scheib
Greg E. Summy
Christine I. Friedman
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

David L. Meyer
Nicholas A. Datlowe
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Suite 6000
Washington, D.C. 20006

Attorneys for Norfolk Southern Railway Company

Dated: May 20, 2011

TABLE OF CONTENTS

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 707

DEMURRAGE LIABILITY

REPLY COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY

Norfolk Southern Railway Company ("NS") offers the following Reply Comments in response to the comments submitted by participants in this proceeding.

INTRODUCTION

The Board's Notice in this proceeding garnered comments from two principal groups of stakeholders: the railroads, who deliver railcars to intermediaries and sometimes charge demurrage fees for delays associated with the handling of those cars, and the warehousemen and other intermediaries, who receive railcars and whose handling of those cars sometimes generates demurrage charges. The comments of both groups confirm that there is an important gap in the demurrage system. The Board should fill this gap by assisting railroads in collecting reasonable demurrage charges from the intermediaries whose conduct causes delays in the utilization of railcars.

This conclusion arises from two essential facts on which both groups of commenters agree. The comments reveal a consensus both that demurrage serves a vital national purpose in fostering efficient car usage and that intermediaries who receive railcars play an important role – along with railroads, shippers and others – in handling

railcars. There is no doubt, then, that demurrage ought to be collectible *from someone* for delays associated with the return of railcars from intermediaries.

The comments also demonstrate that railroads are in fact largely in the dark when it comes to the nature of the relationships, contractual or otherwise, between the intermediaries that receive railcars and other parties involved with those shipments, such as the shipper, the beneficial owner of the freight, and others.

From NS's perspective, these undisputed facts suggest an obvious policy prescription: demurrage charges ought to be collectible from the intermediaries themselves, so that the intermediaries have proper incentives to handle cars efficiently. Without such a policy, a key link in the car handling chain would in many instances receive a free ride, to the detriment of Congress's goal to achieve the efficient use of railcars.

The intermediaries' response to this proposal only confirms why it is so vital that the Board take action to facilitate collection of demurrage charges from such intermediaries. The intermediaries' comments vividly illustrate their refusal to accept any legal responsibility to pay demurrage charges. Instead, they point fingers at others, and even pretend that they have no connection whatsoever to the national rail system. This head-in-the-sand attitude highlights the demurrage gap that NS and others have asked the Board to help close. The Board should confirm that these intermediaries, like all others whose conduct affects the efficiency of the rail network, in fact bear a very important responsibility in the efficient handling of railcars, and as a result are appropriate parties from which railroads may collect reasonable demurrage charges.

The sole remaining question is how to accomplish that aim. NS's Opening Comments laid out a viable framework that would allow railroads to make progress in this direction. It proceeds from a crucial premise: that responsibility for demurrage properly is not, and should not be, thought of as linked solely to the transportation of freight and the contractual relationships relating to such shipments (as reflected in, for example, bills of lading). As the Board has consistently ruled, demurrage relates to the usage of *freight cars* – both when loaded and when empty, regardless of what kind of freight is being shipped or who owns that freight. Accordingly, the parties *who handle the railcars* should be responsible for charges associated with that conduct. NS asks the Board to facilitate efforts by railroads to make that so.

The action NS requests is compatible with the relief requested by AAR and other railroads, which would clarify that when an intermediary is named as consignee in a bill of lading it is presumed liable for demurrage charges based on the bill of lading itself. *See generally* AAR Comments at 23-25. NS supports that relief, but urges the Board expressly to confirm that the bill of lading is not, and should not be, the sole basis for establishing a receiver's legal responsibility to pay reasonable demurrage charges, and to assist railroads in collecting demurrage from all of the intermediaries – not just "consignees" – whose conduct affects the efficiency of railcar utilization.

I. THE OPENING COMMENTS REFLECT BROAD AGREEMENT ON SEVERAL KEY POINTS SUPPORTING THE BOARD ACTION PROPOSED BY NORFOLK SOUTHERN

Two of the key building blocks supporting the Board action proposed by NS in this proceeding are not in dispute: both railroads and intermediaries agree that demurrage provides important incentives for entities that handle railcars to behave efficiently, and

both agree that the conduct of intermediaries – as receivers of railcars – plays an important role in determining whether railcars are handled efficiently.

First, there is no dispute that demurrage serves a vital national purpose in fostering efficient car utilization. As one would expect, the railroad comments recognize the crucial operational purposes served by demurrage.[1] The intermediaries concur. As IALW states, "there is a purpose for demurrage," which "contribute[s] to making [the transportation system] more efficient." IWLA Comments at 2. Savannah Re-Load likewise acknowledges that "demurrage serves a dual role of compensating car owners for the use of their equipment and encouraging prompt return of rail cars into the transportation network . . . [with] this latter goal ensur[ing] the smooth functioning of the rail system." Savannah Re-Load Comments at 1.

Second, there is a similar consensus that intermediaries play an important role – along with railroads, shippers and others – in handling railcars, and that their conduct can give rise to the kinds of inefficiencies and delays that demurrage is designed to address.[2] Savannah Re-Load, for example, acknowledges that "the warehouseman certainly has a role to play in the accumulation of demurrage." Savannah Re-Load Comments at 1. Although the intermediaries are quick to argue that other parties – particularly the railroads – also play a role in efficient car handling, they do not dispute the obvious facts

---

1 *See, e.g.*, Comments of Canadian Pacific at 3 ("demurrage charges are a critical component of a well-functioning transportation network"); Comments of the AAR at 2 ("demurrage is 'an important tool in ensuring the smooth functioning of the rail system,'" quoting STB Advance Notice of Proposed Rulemaking dated December 6, 2010); *see also* NS Opening Comments at 9-11; 49 U.S.C. § 10746.

2 *See, e.g.*, IHB Comments at 4; Freeport Logistics Comments at 2 (indicating that they have paid demurrage when they have been at fault); *see generally* NS Comments at 12-15.

that (a) they take custody of the railcars delivered to them for unloading; (b) they must make room for those deliveries at their facilities to avoid congestion at serving yards and delays in delivery; and (c) they must release those railcars promptly when empty so that the cars can be put back into circulation on the rail system. They also acknowledge that the intermediary's *operational* role does not turn on its legal status: "the carrier will deliver the freight to the same entity in the same manner regardless whether the warehouseman notifies the carrier it is not the consignee." *Id.*, at 3.

At bottom, then, the intermediaries do not question that demurrage ought to be collectible *from someone* for delays associated with the delivery of railcars to intermediaries. Indeed, IWLA confirms that "demurrage is "not the problem" and goes so far as to suggest that its members can "benefit from demurrage." IWLA Comments at 2.

II. THE OPENING COMMENTS OF THE INTERMEDIARIES REFLECT AN UNWILLINGNESS TO TAKE RESPONSIBILITY FOR THEIR ROLE IN HANDLING RAILCARS

The Opening Comments submitted by intermediaries, however, do not accept that they should ever be required to pay demurrage charges. To the contrary, despite acknowledging the importance of demurrage *in the abstract* – and recognizing both that demurrage provides important incentives for the efficient handling of railcars and that intermediaries are an important link in the chain of railcar utilization – the intermediaries nonetheless for the most part refuse to accept any responsibility for demurrage charges or the inefficient car handling practices that generate those charges. The intermediaries' comments highlight precisely the problem that NS has asked the Board to help solve: the

gap in the demurrage system created by intermediaries evading demurrage despite being responsible for car handling inefficiencies.

The position of the intermediaries is a curious one: whatever the cause of inefficient railcar utilization, they should not be called upon to pay demurrage charges. As if echoing that well-known Bob Dylan line – "It Ain't Me Babe" – the intermediaries point fingers in every conceivable direction to avoid being held responsible for demurrage.

- They pretend that they function "outside the transport of goods" (IWLA Comments at 3), and therefore are beyond the reach of railroads seeking to apply evenhanded demurrage rules. They suggest that they lack any contractual relationship with the railroads; at times they imply that they are innocent of any formal contractual, agency or other relationship with anyone; and they suggest that they are merely a place where third parties happen to "deposit" goods from time to time. IWLA Comments at 3; *see also* Savannah Re-Load Comments at 3.[3] They blithely decline to take on any obligation to inform the railroads of the intermediary's legal status in connection with the freight shipment, suggesting that the railroads "should know the status of the receiving party [*i.e.*, the intermediary] through its contract with its customer." IWLA Comments at 7.

---

[3] NS notes the absurdity of this position. The intermediary obviously does have a contractual relationship – whether express or implied – with anyone that uses its services, as many of the intermediaries (and even IWLA, *see* Comments at 6) acknowledge in portions of their statements.

- To the extent the intermediaries do acknowledge their own commercial relationships,[4] they go out of their way to disclaim any liability for demurrage. IWLA reports, for example, that its members spend significant resources to advise the entities that choose to "deposit" goods in their warehouses (*i.e.*, the intermediaries' customers, which direct that railcars be delivered to the intermediaries' facilities) that the intermediaries themselves "should never be named as the consignee" so that they can try to avoid legal responsibility for demurrage. IWLA Comments at 5. The IWLA even provides its members with a standard form letter that allows them, self-servingly, to notify rail carriers that the intermediary "has no contract with and has no liability or other responsibility to your company or any other carrier regarding freight charges, demurrage, detention or other charges relating to such goods." *Id.* at 7.[5] Those intermediaries boldly assert that they "assume[] no liability" notwithstanding that they "allow[] your company to place its equipment at the Warehouse for the purposes of loading and unloading." *Id.* IARW similarly suggests that intermediaries ought to be able to notify carriers "on a blanket basis" – rather than shipment-by-shipment – that they are mere agents who may not be held liable for demurrage. IARW Comments at 4.

- When the intermediaries address the railcar handling inefficiencies that give rise to demurrage charges, they similarly point fingers elsewhere in the chain of transportation. They contend that many of the delays for which carriers assess demurrage are in fact the fault of shippers who send more cars than the intermediaries can handle,

---

[4] According to IWLA, those relationships vary tremendously – even on a shipment-by-shipment basis – preventing railroads from having any meaningful knowledge of how the intermediary has ordered its affairs in any particular case. *See* IWLA Comments at 7.

[5] There is no question that such notice does not comply with the requirements of 49 U.S.C. § 10743.

railroads that "bunch" their deliveries, and carriers that do not switch intermediary facilities often enough. *See* Savannah Re-Load Comments, pp. 2-4; IWLA Comments at 10; IARW Comments at 1, 5.[6] In their eagerness to disclaim responsibility for demurrage, the intermediaries contradict themselves on this subject, suggesting that they "do not control the timing and volume of freight cars,"[7] while also admitting that sometimes they can and do control the timing and volume of shipments to them.[8]

This head-in-the-sand attitude cries out for a clear statement by the Board that these intermediaries, like all others whose conduct affects the rail network, in fact bear a very important responsibility for efficient car handling and thus are among the parties from which railroads should be able to collect reasonable demurrage charges.

---

[6] Arguments about such operational matters are red herrings in this proceeding. Any party against whom a railroad assesses demurrage has an opportunity to assert defenses to those charges. The issue before the Board here is whether railroads ought to be able to *collect* demurrage charges that are reasonably assessed against intermediaries, not whether intermediaries are properly held responsible for delays in any particular case. Nonetheless, substantial Board precedent establishes parameters for the reasonable assessment of demurrage against receivers of railcars, including in circumstances where receivers assert that delays were caused by bunching or inadequate switching. *See, e.g., Capitol Materials Inc. – Petition for Declaratory Order – Certain Rates & Practices of Norfolk Southern Ry.*, STB Docket No. 42068 (served Apr. 12, 2004) (rejecting claims of bunching and inadequate switching frequency, holding that "bunching relief is normally excluded under an average demurrage agreement" because "many variables outside a railroad's control that may affect delivery [such that] a railroad cannot reasonably be expected always to be able to meet an ideal delivery timetable," and also that "[m]any railroads provide shippers of Capitol's size with just one switch per weekday"). The Board need not address such matters in this proceeding.

[7] IWLA Comments at 3-4.

[8] *Id.* at 6 ("3PL Warehouse contracts will vary by customer on issues like how many cars they will accept, how long they are allowed to unload, indemnity for demurrage claims by railroads, limits on amount of demurrage per day/month, etc.").

III. THERE IS NO OBSTACLE TO BOARD ACTION TO FACILITATE THE COLLECTION OF DEMURRAGE FROM RESPONSIBLE INTERMEDIARIES

The comments from both sets of stakeholders in this proceeding demonstrate the need for Board action to close the important gap in the demurrage system posed by intermediaries that handle railcars. The Board's obligation to take such action in this proceeding is magnified by the role the Board played in persuading the Supreme Court to decline review of the *Groves* case, thereby extinguishing NS's effort to close the loophole opened by the Eleventh Circuit's misguided decision in that case. As the Board is aware, the Board's counsel joined the Solicitor General (on behalf of the United States) in recommending that the Court decline review in *Groves* because *this proceeding* offered a superior forum for addressing the problem posed by *Groves*, and potentially establishing "a default rule (or rules) . . . for demurrage liability."[9] That brief alerted the Court to the fact that this proceeding had already been commenced and reminded the Court of the Board's "longstanding legal and practical expertise in demurrage matters," its ability to reconsider old administrative precedent, and its ability to adopt in this proceeding a solution that could be adapted to evolving market conditions.[10] Having successfully urged the Supreme Court to defer to the Board's superior ability to act in this proceeding, fairness and sound policy demand that it do so.

NS's Opening Comments outlined a viable approach that would help close the important gap in the demurrage system posed by intermediaries: (1) a policy statement expressing the Board's determination that that intermediaries must be subject to

---

9 *Groves*, No. 09-1212, Brief for United States as Amicus Curiae (U.S. Dec. 2010) at 12-13.

10 *Id.* at 14-17.

reasonable demurrage charges whenever their conduct results in inefficient car utilization, coupled with (2) a statement confirming that *consignors* bear responsibility for demurrage attributable to the conduct of the receivers to which they instruct carriers to deliver railcars.[11] These statements by the Board would go a long way toward assisting NS and others in establishing legal recourse to collect demurrage charges without needing to rely on the bill of lading as the governing contractual document.

None of the opening comments of other parties reveals any obstacles to the Board taking these simple steps. NS briefly addresses four sets of issues raised in the opening comments.

1. ***The intermediaries' emphasis on a contractual basis for liability is no obstacle.*** Because it furthers their objective of *avoiding* liability based on the bill of lading, the intermediaries are adamant that their liability for demurrage must be established by contract. IARW suggests, for example, that intermediaries "should not be liable to the rail carriers for demurrage charges unless they enter into separate written agreements with the rail carriers," while at the same time declining to explain why any intermediary would enter into such an agreement under the current regime, which often allows them to escape responsibility altogether.[12]

NS supports any path that would allow railroads efficiently to collect demurrage from intermediaries whose conduct causes delays in the handling of railcars. One such path is via the bill of lading, which courts have long held establishes the contractual liability of the consignee. NS supports the requests of the AAR and other railroads for

---

[11] As noted above (at page 6), NS also supports the relief requested by the AAR and other railroads. *See generally* AAR Comments at 23-25.

[12] IARW Comments at 3.

the Board to state that when an intermediary is named as consignee in a bill of lading it is presumed liable for demurrage charges based on the bill of lading itself. As NS explained in its Opening Comments, however, the bill of lading need not be the *only* source of potential contractual liability to pay demurrage.[13] An intermediary ought *also* to be liable based on principles of implied contract and industry custom as a result of its voluntary acceptance of the railcar placed on its tracks, and carriers should have the flexibility to proceed to establish liability on this basis even when the intermediary is not the consignee, or when it seeks to pass off its responsibility by declaring its agency status for purposes of the freight shipment and identifying a responsible principal (though the intermediary ought never to be able to pass off its responsibility arising out of its status as the entity handling the railcar).[14] The Board plays an important role in assisting railroads in establishing such independent bases for liability, both because it can speak to the appropriate industry custom and practice needed to comport with the statutory purposes of demurrage, and also because it alone may establish the scope of reasonable railroad conduct aimed at assuring that intermediaries accept their proper responsibility.

Once the legal responsibility of the intermediaries to pay demurrage is established, those intermediaries will be able to sort out with their commercial partners (*e.g.*, their "depositors," the owners of freight, or others who direct freight to intermediary facilities) about which of them will bear the ultimate financial

---

[13] *See* NS Opening Comments at 22-28. IARW acknowledges that the bill of lading s not the sole potential basis for liability when it suggests that carriers that "want[] the right to go directly against the public warehouse operator to recover demurrage charges ... can enter into an actual placement or similar agreement." IARW Comments at 2.

[14] Indeed, this appears to be in substance the basis of Indiana Harbor Belt's valid claims for demurrage against intermediaries, since as an intermediate switching carrier IHB is typically not a party to the bill of lading. *See* IHB Comments at 1.

responsibility. Just as shippers today have recourse against "public warehouse operators" when the warehouse operator causes the "shipper or consignee [to] become[] liable to the rail carrier for demurrage charges" (*see* IARW Comments, at 2), so too could the intermediaries work out arrangements for reimbursement by their commercial partner shippers or consignees when railroads are able to collect demurrage from the intermediaries. The record here clearly establishes that these parties enter into contracts today to which railroads are not parties, and arrangements for reimbursing the intermediary for demurrage would simply be one other term in those contracts.[15] The advantage would be that demurrage charges would be collectible in the first instance from the party (*i.e.*, the intermediary) that handled the car, that is readily identifiable by the railroad, and whose conduct ought to be guided by the incentives created by the system of demurrage.

The rigid approach of the intermediaries that would require demurrage liability to be based on an express contract between an intermediary and a railroad is another reflection of today's *problem* rather than a workable solution. So long as the intermediaries claim for themselves complete discretion to decline to enter a "demurrage contract," experience and the opening comments in this proceeding show that they will continue to resist collection whenever they can.

2. ***The potential inapplicability of Section 10743 would reinforce rather than hinder adoption of NS's proposal.*** In their zeal to avoid any potential responsibility for demurrage, some of the intermediaries contend that Section 10743 should be interpreted as not applying to demurrage at all. *See* ILWA Comments at 8;

---

[15] *E.g.*, IARW Comments at 1; Freeport Logistics Comments at 1; IWLA Comments at 6.

Savannah Re-Load Comments at 3.[16] They no doubt assert that position in order to avoid having their liability established by Section 10743 in situations where the consignee-intermediary make no effort to identify any principal on whose behalf it is acting, and who would be responsible for paying demurrage.

As explained in NS's Opening Comments (Appendix, pp. 35-38), NS regards the applicability of Section 10743 to demurrage as largely beside the point for purposes of this proceeding. Intermediaries and other receivers of railcars ought to be responsible for payment of demurrage charges regardless of whether they are consignees, and thus regardless of whether they may be acting as an agent for a principal (disclosed in accord with Section 10743) in connection with the transportation of the freight. That is the only way the national interests related to car supply and efficiency are promoted. So long as long as the Board makes clear that the receiver *of the railcar* is liable to the railroad for demurrage, NS would not object to the Board concluding that Section 10743 was not intended by Congress to apply to charges for demurrage. Such a rule would of course avoid the concerns expressed by intermediaries regarding such matters as Section 10743's "technical notification requirements," since liability would not turn on such issues. *See, e.g.*, Savannah Re-Load Comments at 3.

The inapplicability of Section 10743 to demurrage would not stand in the way of the Board issuing the policy statements that NS has proposed. Quite to the contrary, it would provide further support for such action. Such a conclusion would underscore that legal responsibility to pay demurrage is properly linked to the *handling of railcars* rather

---

[16] IARW takes a different approach, endorsing the application of section 10743 to demurrage. See IARW Comments at 2 (citing *Groves*).

than being exclusively driven by the contract governing the movement of the *freight* (*i.e.*, the bill of lading), which is exactly the position NS has urged the Board to take and is the rule that best promotes the national interest in an adequate and efficient car supply.

As NS's Comments explained, Board and judicial precedents have long regarded demurrage as a car-handling matter rather than as part of the "transportation charges" for movement of freight. NS Comments at 36 n.50. Indeed, the Board has relied on precisely this characteristic of demurrage to conclude that the Board's commodity exemptions do not apply to demurrage incurred in connection with shipments of exempt commodities. *Savannah Port Terminal R.R. – Petition for Declaratory Order – Certain Rates & Practices as Applied to Capital Cargo, Inc.*, STB Finance Docket No. 34920 (served May 30, 2008) ("Demurrage is a matter regarding use of equipment and is related to car service."). Having concluded that it will continue to regulate demurrage charges because they involve "equipment" and "car service," NS submits that it would defy logic for the Board to conclude that demurrage charges may only be collected from parties responsible for *transportation charges* under the transportation contract.

3. ***NS's proposal would reduce rather than create confusion.*** One commenter expresses concerns about "a rule that makes any party that accepts physical delivery liable in all instances, regardless of its status on the bill of lading," because such a rule "could itself generate confusion." Canadian Pacific Comments at 21-22. NS does not share this concern. To the contrary, NS believes that Board action that assisted railroads in collecting demurrage from the intermediaries whose conduct generated the charges in the first place would substantially *reduce the confusion that already exists* regarding the role of the intermediary – confusion that the Supreme Court decided not to

remove when it declined review of the *Groves* case. Such a rule would be clear and easy for all parties to understand. It would permit parties that wanted to shift liability for demurrage by contract to do so with a clear understanding of what the rules otherwise would be. It would also enable demurrage charges to be assessed against a *readily identified* entity – and equally important, *the correct entity* for the charges to create proper incentives for efficient behavior. That new clarity will enable demurrage to serve its important function more efficiently. The fact that other parties (*e.g.*, the consignor) might *also* potentially be responsible for paying demurrage in a particular instance would not be any more confusing than the current regime, in which railroads may seek collection both from the consignee (or its disclosed principal) and the shipper. *See* NS Comments at 20-22.

4. ***NS's proposal gives force to the notion that the party causing demurrage should be held responsible for it.*** Finally, one intermediary – Savannah Re-Load – contends that "[t]he way to truly incentivize each party to the transportation network to work in the most efficient manner is to hold the party which causes the demurrage responsible for it." Savannah Re-Load Comments at 3. In principle, NS could not agree more. That is exactly why it is so important that the Board help fill the existing gap that unnecessarily protects intermediaries from the consequences of their own action.

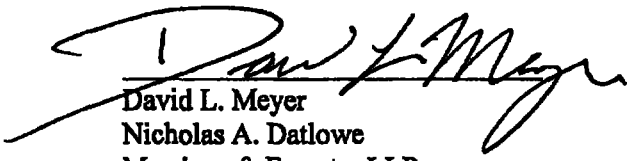
Savannah Re-Load's notion of "fault," however, is not consistent with the purposes of an efficient demurrage system. Savannah Re-Load seeks instead to bog down collection of demurrage with endless litigation before judges and juries over the assertedly "thorny factual issues" raised by intermediary car handling. *See* Savannah Re-Load Comments at 4. Savannah Re-Load vastly overstates the complexity of the

supposedly "thorny factual issues" issues, which are already routinely dealt with when parties assessed demurrage dispute those charges. Savannah Re-Load also badly misunderstands the vital role played by the Board itself (and not judges and juries) in determining when reasonable demurrage charges are properly assessed. *See, e.g., Capitol Materials Inc. – Petition for Declaratory Order – Certain Rates & Practices of Norfolk Southern Ry.*, STB Docket No. 42068 (served Apr. 12, 2004) (considering question of reasonableness of demurrage charges on referral from federal district court). In its decision in this case, the Board should confirm that it has responsibility for determining when railroads may reasonably assess demurrage charges relating to delays associated with deliveries to intermediaries, including delays relating to the delivery of more cars than an intermediary can handle at one time.

CONCLUSION

NS respectfully requests that the Board grant the relief requested in NS's Opening Comments in this proceeding. The Board should issue policy statements establishing that, (1) in order to achieve Congress's goals, intermediaries must be responsible for paying reasonable demurrage charges whenever their conduct affects the physical handling of railcars, and (2) that the consignors of shipments to such intermediaries must also remain responsible for demurrage charges accruing at the destinations to which they instruct carriers to deliver cars. Such action would assist railroads in filling the existing gap in the demurrage system and thereby carry out Congress's command that the system of demurrage serve the "national needs" in efficient use of, and investment in, railcars.

Respectfully submitted,



David L. Meyer
Nicholas A. Datlowe
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Suite 6000
Washington, D.C. 20006

James A. Hixon
John M. Scheib
Greg E. Summy
Christine I. Friedman
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

Attorneys for Norfolk Southern Railway Company

Dated: May 20, 2011

CERTIFICATE OF SERVICE

I, Nicholas A. Datlowe, certify that on this date a copy of the Reply Comments of Norfolk Southern Railway Company, filed on May 20, 2011, was served by email and by first-class mail, postage prepaid, on all parties of record.

Nicholas A. Datlowe

Dated: May 20, 2011